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No. 86

October Term 1960

IN THE

Supreme Court of the United States

THE CALIFORNIA COMPANY, a corporation,

Appellant,

v.

STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR REHEARING

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Appellant petitions this Court to grant rehearing of its order of October 10, 1960, dismissing the appeal in this case for want of a substantial federal question, without citing any authority supporting this conclusion.

GROUNDS FOR PETITION

1. This case involves the constitutionality of a state tax at progressive rates on gross income.

The federal question was raised and decided in the state court below; there is no non-federal ground on which the decision of the state court can rest.

There are at least two decisions of this Court—*Stewart* and *Valentine**—holding such a tax unconstitutional.

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* *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S. Ct. 525, 79 L. Ed. 1054;

Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 57 S. Ct. 56, 81 L. Ed. 22, 12 F. Supp. 760.

Graduated taxes on gross sales or receipts have been held invalid by the highest courts of at least three states: Vermont, Wisconsin and Florida.*

There is not a single decision of this or any other court —other than the decision of the court below in this case— upholding a tax at progressive rates on gross income or receipts.

To use the words of Mr. Justice Frankfurter in his dissent in *Northwestern Cement Co. v. Minn.* (1959) 358 U.S. 450, at page 473:

> "If new ground is to be broken, the ground must be justified and not treated as though it were old ground."

2. In *National Tea Co. v. State* (Minn. 1939) 286 N.W. 360, the Minnesota court held invalid a graduated tax on the gross sales of chain stores. This Court granted certiorari, saying in *State of Minnesota v. National Tea Company* (1940) 309 U.S. 551, at page 552:

> "We granted certiorari, 308 U.S. 547, 60 S. Ct. 294, 84 L. Ed. ....., because of the importance of the constitutional issues involved in Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 57 S. Ct. 56, 81 L. Ed. 22, which cases, it was asserted, controlled the decision below."

There have been no decisions by this Court since 1940 passing on a graduated tax on gross sales or receipts, or foreclosing the questions presented here.

If the Court granted certiorari in *National Tea* in 1940, it should hear the appeal here.

3. Appellant contended, and contends, that the deci-

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* *Great Atlantic & Pacific Tea Co. v. Harvey* (Vt. 1935) 177 Atl. 423;

Ed. Schuster & Co. v. Henry (Wis. 1935) 261 N.W. 20, cert. den. (1935) 296 U.S. 625;

State v. Lee (Fla. 1936) 166 So. 249.

sions of this Court in *Stewart* and *Valentine* control this case. In upholding the tax in question, the Colorado court referred to or suggested several arguments as to why *Stewart* and *Valentine* should not control its decision, but did not clearly adopt any. Instead it said:

> "Decisions of the Federal Supreme Court following the Stewart and Valentine cases have rendered opaque that which could have been considered crystal clear by the pronouncements of those two cases."*

and after discussing several such decisions, concluded that:

> "There are intimations in the federal decisions that a tax such as this does not offend the Fourteenth Amendment."**

The Colorado court upheld the validity of the tax, then, not on the basis of any clear-cut decisions of this Court, but on the ground that the crystal clear decisions in *Stewart* and *Valentine* have been rendered "opaque" by "intimations" in later decisions of this Court. One is reminded of Mr. Churchill's "riddle wrapped inside an enigma."

In *Louisville & Nashville R. R. v. Melton* (1910) 218 U.S. 36, the Court said of a contention that an appeal should be dismissed on the ground that the federal question relied on had been conclusively foreclosed by prior decisions of the Court (pp. 49-50):

> "The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave

* App. to Juris. Statement, p. 40.
** App. to Juris. Statement, p. 43.

no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, *a*, because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *b*, because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and, *c*, because while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power consistently with the equal protection of the law clause to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review as construed below is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

See also:

Griffith v. Connecticut (1910) 218 U.S. 563, at 571;

Linehan v. Waterfront Commission (1954) 347 U.S. 439;

Brownell v. Singer (1954) 347 U.S. 403.

So here, analysis and expounding clearly are necessary, to say the least, for anyone to reach the conclusion that prior decisions of this Court justify this tax, and since the validity of a progressive tax on the gross receipts from

the production of oil and gas has never been passed upon, the question presented cannot be said to be foreclosed by prior decisions of this Court.

4. In its opinion the Supreme Court of Colorado also suggests that *Stewart* and *Valentine* would be overruled if the questions put in those cases were presented to this Court anew, saying:

> "Are decisions subsequent to the Stewart case, and a few state decisions hereinafter discussed straws in the wind? Are there indications that the Stewart minority opinion would be adopted if the Federal Supreme Court could entertain anew the question? The State of Colorado in the instant case assiduously advocates the likelihood of a change of philosophy by reason of the evolution of the law and the difference in cast composing the highest court of the land at this time."*

In its motion to dismiss the appeal herein, however, the State of Colorado seeks to distinguish *Stewart* and *Valentine* rather than urging the Court to overrule these decisions.

It is impossible to tell from the order of October 10, 1960, whether this Court agrees with the argument of the State of Colorado before the Colorado court that *Stewart* and *Valentine* are no longer good law, or with the argument of the State of Colorado before this Court that these cases are distinguishable here.

Are state courts hereafter to decide federal constitutional questions by trying to guess whether the then current members of this Court would decide controlling cases the same way if presented with them anew?

If this Court is to retain and exercise effective control of the adjudication of federal constitutional issues it should hear and decide this appeal.

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* App. to Juris. Statement, pp. 41-42.

5. The tax in question is not a severance tax. Colorado has ruled that the tax applies only to oil and gas severed and sold, and not to oil and gas severed and used or wasted. Thus the tax is laid not on the severance, but on the sales, including sales in interstate commerce. This means (a) that the measure of the tax bears no reasonable relation to the activities local to Colorado, i.e., the severance of oil and gas, and that these activities cannot afford a basis for the tax; and (b) that the tax is a direct and undue burden on interstate commerce, subjecting it to the possibility of multiple taxation.

6. The tax involved in this case is of a type which has been discussed with increasing frequency in recent years. Legislators, bench, bar and business would be indebted alike for a clarification of the important constitutional questions involved in this appeal.

It is respectfully submitted that this petition for rehearing should be granted, and probable jurisdiction of this appeal noted.

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CERTIFICATE OF COUNSEL

I, JOHN P. AKOLT, one of the attorneys for The California Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN P. AKOLT